No 31. as ſaid is. Likeas, before the proponing of this exception, the tenants alleging that they were tenants to the ſaid apprifer, to whom they had paid their mails, and he not being ſummoned, no proceſs ought to granted; this was alſo repelled, and therefore he compeared for his intereſt *ut ſupra*. The like to this deciſion, *in terminis*, was done in Huttonhall againſt Touch, No 34. p. 1301.

Act. *Lawrie.* Alt. ——. Clerk, *Gibſon.*

Fol. Dic. v. 1. *p.* 89. *Durie, p.* 19.

1622. *March* 28. MURRAY of Lochmaben *againſt* SCOT of Harden.

No 32.
A lady infeft baſe by her huſband, for her liferent, was *in mora* after his death, and did not take ſteps to attain poſſeſſion. She was conſequently excluded in a competition. *See* No 41. p. 1309.

IN a decreet arbitral betwixt Scot of Bonnitoun and Scot of Haining; Scot of Bonnitoun and his heirs are decerned to have three chalders of victual yearly and perpetually out of certain lands pertaining to Haining; which being bruiked, conform to the decreet, and uplifted by Bonnitoun, and alſo by his heir after his deceaſe, the heir thereafter remaining year and day at the horn, John Murray of Lochmaben, as donatar to his liferent, purſues for that yearly duty during the rebel's lifetime; againſt which Scot of Harden, donatar to the ſingle eſcheat of this ſame heir, *alleged* the ſame belonged to him by the ſingle eſcheat, in reſpect the decreet arbitral fell under the ſingle eſcheat; and albeit thereby the victual was ordained to be paid to the heir yearly thereafter perpetually, yet that could not cauſe it pertain to the donatar to the liferent, ſeeing it was neither a liferent right to the ſaid heir, nor an heritable right, and had no holding, nor no lawful ſecurity perfected thereupon; without the which, it could not fall under a liferent eſcheat, but behoved to pertain to him by virtue of his ſingle eſcheat acquired long before this donatar's right: Which allegeance the LORDS repelled, and found no more fell under the ſingle eſcheat, but ſo many years bygone as were owing the time of the giving of the ſaid ſingle gift, and that all the reſt fell under the liferent.

In this ſame proceſs, the relict of Scot of Haining having compeared and alleged that her huſband, (out of whoſe lands, the foreſaid yearly duty of three chalders victual was appointed to be paid by the ſaid decreet arbitral,) had by charter and ſaſine infeft her in the ſaid lands, before the date of the ſaid decreet, during her lifetime; ſo that the ſaid decreet being after her right, and ſhe not being a ſubmitter nor conſenter to the decreet, the donatar, nor the rebel's ſelf, could have no duty out of the foreſaid lands during her lifetime. This allegeance the LORDS repelled, becauſe the donatar offered to prove by reply, that the charter and ſaſine were but baſe, given by the huſband to the wife. Likeas Scot of Bonnitoun, during his lifetime, and after his deceaſe, his heir the rebel, whoſe liferent was craved, remained in poſſeſſion, not only during the lifetime of the relict's huſband, but alſo diverſe years after his deceaſe; the relict doing no lawful deed to recover poſſeſſion by virtue of her right, nor quarrelling the rebel's

poſſeſſion, which ſhe might have done after her huſband's deceaſe, if her right had been lawful; but ſuffering the party to bruik the ſaid victual conform to the decreet arbitral, ſo that now ſhe cannot obtrude that right. Which reply the LORDS admitted to the purſuer's probation. *See* ESCHEAT. No 32.

Act. ——. Alt. *Scot.* Clerk, *Gibſon*, *Durie*, *p.* 25.

1628. *July* 23. LA. EDNAM *againſt* The LAIRD.

No 33.
A tack was preferred to a baſe infeftment, granted afterwards by the landlord to his wife, though her ſaſine was taken before the tackſman obtained poſſeſſion.

IN an action for poinding of the ground, Lady Ednam, the LORDS found, That a ſaſine of an annualrent, taken at any part of the barony, out of which the annualrent is diſponed to be uplifted, where all the lands of the barony ly contiguous, doth affect all the lands and others belonging to the barony, the ſame lying contiguous as ſaid is; albeit the ſaid ſaſine be not taken at the place deſtinate and appointed for taking of ſaſine in the charter and evidents of that barony, made and granted to him, who is the granter of the annualrent; and there being exception proponed, that the defenders had a tack of the lands, ſet for an onerous cauſe by him, who was the purſuer's author, and before the purſuer's right, whereby they *alleged*, That the ground could not be poinded for any more at the purſuer's inſtance, but for the duty of their tack; ſeeing, conform to their tack, they were in poſſeſſion of the land, diverſe years before the deceaſe of the ſetter, and had paid the tack-duty to the ſetter, and had reported his diſcharge thereon: This exception was found relevant, notwithſtanding of this *reply*, That the purſuer's ſaſine was given for implement of her contract of marriage, and ſo was the more favourable; and the ſame was more real than a tack, which tack could not maintain the excipients, except it had been clad with poſſeſſion before her ſaſine; for her huſband's poſſeſſion was her poſſeſſion, and no ſubſequent poſſeſſion of the tackſman, after her right, could make the tack to ſubſiſt againſt her? Which reply was repelled, and the tack ſuſtained, being ſet for an onerous cauſe to lawful creditors, and before her ſaſine; which tack being clad with poſſeſſion in the ſetter's lifetime, albeit not before the purſuer's right, was found ſufficient; and found, that the defenders needed not to allege poſſeſſion before her right, and ſo the ſaid exception was admitted. *See* UNION.

Fol. Dic. v. 1. *p.* 99. *Durie*, *p.* 393.

1631. *February* 15. LADY HUTTONHALL *againſt* L. of TOUCH.

No 34.
Found in conformity with No 31. p. 1299.

THE Lady Huttonhall being infeft in the lands of Gauldſtream, upon her contract of marriage, ſhe, for payment of her huſband's debts, conſents to the alienation of the ſame lands, and renounces her liferent therein in April 1621; at